IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

THELMA SCHEMBRE, et al	)	
	)	
Appellants,	)	
	)	**APPEAL NO. ED81539**
vs.	)	
	)	
MID AMERICA TRANSPLANT SERVICES, et al	)	
	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of the Twenty-Third Judicial Court of Missouri at Hillsboro, Jefferson County State of Missouri

---

APPELLANTS' BRIEF

ROBERT J. LENZE, P.C.

By: _____
Robert J. Lenze, #31789
Attorney for Appellants
3703 Watson Road
St. Louis, Missouri 63109
Telephone: (314) 781-0391
Fax: (314) 781-0324

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

Appellants, Thelma Schembre, Laurie Laiben, Bobby Joe Schembre, Rebecca McNair, and Frank Schembre, Jr., appeal from two (2) Summary Judgments. The first Summary Judgment was granted in favor of Respondent, Mid-America Transplant Services, on June 14, 2002.(LF 287) The second Summary Judgment was granted in favor of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, on July 5, 2002.(LF 337) These Orders of Summary Judgment were entered by Jefferson County Circuit Court Judge Gary P. Kramer, 23rd Judicial Circuit. The underlying cause of action is based on interference with the right of sepulcher and infliction of emotional distress. No post-trial motions have been filed. Appellants timely filed their Notice of Appeal on July 24, 2002. (LF 338-341)

STATEMENT OF FACTS

Appellant, Thelma Schembre, is the widow of Frank Schembre, Sr., deceased. Appellants, Rebecca M. McNair, Bobby Joe Schembre, Laurie V. Laiben, and Frank Schembre, Jr., are the children of Frank Schembre, Sr., deceased.

On November 28, 1998, Frank Schembre, Sr., suffered a heart attack, and was taken by ambulance to the Emergency Room at Respondent, Jefferson Memorial Hospital. Appellants, Thelma Schembre, Laurie Laiben, and Bobby Joe Schembre, were present at the hospital within a short time after Frank Schembre, Sr., was transported to the hospital.(LF 355-6) Appellants, Rebecca M. McNair, and Frank Schembre, Jr., did not reside in Missouri at that time, and were not present at the hospital that day.

Appellants present at the hospital were notified by hospital staff within a short time after their arrival that Frank Schembre, Sr., was not able to be resuscitated and had passed away.(LF 415) Within a few minutes of being informed of his death, Appellants present at the hospital were approached by Respondent, Christopher Guelbert, an employee of Respondent, Jefferson Memorial Hospital, assigned to the Emergency Room that day.(LF357) His purpose was to inquire about their willingness to consider donation of organs, bone and tissue from the body of Frank Schembre, Sr., now deceased.(LF 417)

Appellants, Thelma Schembre, Laurie Laiben, and Bobby Joe Schembre, were all present during this discussion with Respondent, Christopher Guelbert, concerning the details and procedures of potential donation of the requested organs, bone and tissue from the body of Frank Schembre, Sr. It is undisputed this discussion took place in the area of Respondent, Jefferson Memorial Hospital, designated as the "quiet room," where people are directed after the death of a family member. It is further undisputed most of the discussion and statements were directed to Appellant, Thelma Schembre, as the spouse of Frank Schembre, Sr., deceased.(LF 416-7)

Appellants present in the "quiet room" were informed that Frank Schembre, Sr., did not meet the requirements for donation of organs, such as kidneys, liver, lungs, etc.(LF 357-8) After that representation was made to Appellants, much of the remaining discussion centered on the particulars of the process for donations of eye, bone and tissue. All parties to the discussion agree consent was given by Appellant, Thelma Schembre, for donation of the corneas from the eyes of Frank Schembre, Sr.(LF 419-421,423) When the discussion turned to donation of bone and tissue, and centered around the donation of bone from the body of Frank Schembre, Sr., Appellants, Thelma Schembre, Laurie Laiben, and Bobby Joe Schembre, insist it was explained to them by Respondent, Christopher Guelbert, that the process of donation of bone involved taking a portion of the long bones of the lower leg only, and was limited to removal of only 2-4 inches of bone from the lower leg of the

deceased family member.(LF 111-112) The form signed shows there was no consent given for the removal of any tissue as part of the process of the removal of that limited amount of bone.(LF 208)

Appellants also testified it was represented to them by Respondent, Christopher Guelbert, this bone would only be used for such things as bone marrow transplant, and not for research of any kind whatsoever.(LF 110, 112) According to all Appellants present in the "quiet room", this representation of the limited amount of bone to be removed was also made that same evening by a second female person at Respondent, Jefferson Memorial Hospital, whose identity is unknown to the Appellants, and who was assumed to be an employee of Respondent, Jefferson Memorial Hospital. This assumption was based, in part, on the fact she came into the "quiet room" with the same clipboard containing a partially filled out consent form previously held by Respondent, Christopher Guelbert, during his discussion with Appellants.(LF 114)

Appellant, Thelma Schembre, testified she emphasized and stated repeatedly to this second unidentified person she was only agreeing to donate a maximum of four inches of bone from the lower leg of her deceased husband's body.(LF 115-116) Appellant, Thelma Schembre, also emphasized and stated repeatedly to this person she was imposing a limitation on the uses to be made of any removed bone or eye corneas, and research was absolutely not permitted.(LF 116) This person also represented to Appellant, Thelma Schembre, that the entire eyeball was not going to

be removed from the body of the deceased, but only a portion of the eyeball consisting of the lens or cornea would be removed.(LF 116)

Respondent, Christopher Guelbert, and the unidentified female employee of Respondent, Jefferson Memorial Hospital, each had with them a document labeled "Organ and Tissue Donation Consent Form." (LF 208) It was the understanding of Appellant, Thelma Schembre, that the various limitations and restrictions she was discussing with these two representatives of Respondent, Jefferson Memorial Hospital, were being recorded and noted on this form.(LF 116) Because of the proximity in time to the death of her husband, Appellant, Thelma Schembre, testified she did not believe she was able to read and understand the document at the time it was presented to her for her signature.(LF 117)

Appellant, Laurie Laiben, was also present in the "quiet room" at Respondent, Jefferson Memorial Hospital, during the discussion between Respondent, Christopher Guelbert, and Appellant, Thelma Schembre concerning, the donation of eye corneas, organs, bone and tissue.(LF 357) Her recollection is when Respondent, Christopher Guelbert, was questioned about precisely what was involved in the donation of bone, he responded by indicating on his own calf that the amount of bone removal is limited to 2-4 inches from the calf of one of the legs of the deceased.(LF 358, 359)

Appellant, Bobby Joe Schembre, testified he recalls specific statements by his mother, Appellant, Thelma Schembre, that she did not want any potential eye

cornea, organ, bone or tissue donation to have anything to do with research and repeated that statement several times.(LF 418) His recollection is further that Respondent, Christopher Guelbert, left the "quiet room" to request information or input from an additional person at Respondent, Jefferson Memorial Hospital.(LF 418, 419) Respondent, Bobby Joe Schembre, testified that the representation made by the new person summoned by Respondent, Christopher Guelbert, was that the entire eyeball is not removed, but the eyeball is slit and the lens is removed from the eye.(LF 420) It is also his testimony this person verified to all Appellants present in the "quiet room" that for donation of bone, only a 2-4 in. section was removed from the leg, between the knee and the ankle.(LF 420) This new person restated the representation that no body parts taken would be used for research, and the parts were being donated only because there was a specific need.(LF 420-421) Appellant, Bobby Joe Schembre, further testified that when an explanation was given to his mother, Appellant, Thelma Schembre, that only the lenses of the eye were to be removed from the body of his father, Frank Schembre, Sr., now deceased, only then did she consent to donation of that body part.(LF 423)

It is the testimony of Respondent, Christopher Guelbert, that he informed Appellant, Thelma Schembre, as well as Appellants, Laurie Laiben and Bobby Joe Schembre, of the full extent of bone and tissue which would be removed and that the entire eyeball would be removed.(LF 221) He testified he emphasized to Appellant, Thelma Schembre, and her children, Appellants, Laurie Laiben and Bobby Joe

Schembre, that if consent was given for donation of bone, all of the bone from both legs would be removed from the body of Frank Schembre, Sr.(LF 221) The testimony of Respondent, Christopher Guelbert, was that not only does he specifically recall discussing removal of all the long bones from the legs of Frank Schembre, Sr., but, further, that these bones could be used in orthopedic cases, for dental procedures, or any other medical procedure to assist someone who has suffered bone loss.(LF 220)

He has testified he does recall that Appellant, Thelma Schembre, told him that none of the tissue from the body of her husband, Frank Schembre, Sr., was to be used for research.(LF 221) The form on which he recorded the consent of Appellant, Thelma Schembre, for donation of eyes, bone and tissue failed to indicate any limitation prohibiting use of the donated bone or tissue for medical research.(LF 208) His testimony is that there was no representation by him indicating any limitation on the length of bone to be removed or a specific limitation to the removal of only four inches of bone.(LF 224)

The testimony presented during discovery is undisputed that Respondent, Christopher Guelbert, contacted Respondent, Mid-America Transplant Services, soon after the death of Frank Schembre, Sr. The testimony also demonstrates a copy of the consent form (LF 208) signed by Appellant, Thelma Schembre, was faxed to the offices of Respondent, Mid-America Transplant Services.(LF 126) At least two phone calls were made by Respondent, Christopher Guelbert, from

Respondent, Jefferson Memorial Hospital, to persons at Respondent, Mid-America Transplant Services, on the evening of November 28, 1998.(LF 224) The substance of these conversations between Respondent, Christopher Guelbert, and Respondent, Mid-America Transplant Services, included questions about the suitability of the body of Frank Schembre, Sr., deceased, as a potential donor for eyes, bone, and tissue.(LF 224)

Later that evening, Respondent, Mid-America Transplant Services, dispatched a group of three persons as a Tissue Recovery Team to Respondent, Jefferson Memorial Hospital, to cut out and remove various pieces of the body of Frank Schembre, Sr., recently deceased.(LF 127-129) Once this team arrived at Respondent, Jefferson Memorial Hospital, the entire eyeball was removed, rather than the cornea only or the lens.(LF 133) The testimony from representatives of Respondent, Mid-America Transplant Services, has been that they were unaware of any limitations on the amount of bone to be removed from the legs and lower body of Frank Schembre, Sr. Rather than limiting the removal to the 2-4 inches of bone from the lower leg of the body of Frank Schembre, Sr., as understood by Appellant, Thelma Schembre, the Tissue Recovery Team began its standard recovery procedure for cutting out and removing all of the large bones from the lower half of the body of Frank Schembre, Sr.(LF 132-134)

The first step in the procedure of removing these long bones from the leg, was to

make an incision above the iliac crest, or protruding point of the hipbone.(LF 134) The muscles and skin were pulled away from the incision and the fascia lata was then cut away from the body, in a portion as large as 60-72 square inches from each side of the body.(LF 134) Next, the femurs from both sides of the body were cut away from the hip and the knee with scalpels.(LF 134) Then the fibulas and tibias, with patellar tendons attached, were removed by cutting away from the body and the ankle joint.(LF 134) Finally, the iliac crests, down to the area where they fuse to the sacrum, were removed.(LF 134-135)

At the same time the tissue recovery team removed all of these items from the body, they prepared and completed a Standard Tissue Retrieval Procedure Report.(LF 78) The Report completed in connection with cutting out and removing eyeballs, tissue and bone from the body of Frank Schembre, Sr., indicates, by a typewritten entry, "whole heart removed."(LF 78) Although the form report has that typewritten entry, a member of the Tissue Recovery Team testified neither the heart, nor any of the valves or other tissue from the heart, was cut out of Frank Schembre, Sr.(LF 140)

The remaining Appellants, Rebecca M. McNair and Frank Schembre, Jr., arrived in the St. Louis area for the funeral of their father within 24 hours of his death. All Appellants went to Vinyard funeral home to participate in the funeral planning process. It was there they learned of the extensive mutilation of the body of Frank Schembre, Sr., which far exceeded their understanding of the scope of

permission given on November 28, 1998.(LF 249) It was at that time members of the family learned that when the actual removal of bone was performed on the body of Frank Schembre, Sr., the entire pelvic girdle, the fascia lata, and all bones of both legs were removed from his body, rather than the amount of 2-4 inches of bone authorized at the time of his death.(LF 249)

All Appellants joined as Plaintiffs and filed their Petition against Respondents, Mid-America Transplant Services, Jefferson Memorial Hospital, and Christopher Guelbert, on January 4, 2000.(LF 13-22) Respondents, Jefferson Memorial Hospital and Christopher Guelbert, named as Defendants in the Circuit Court action, filed Motions to Dismiss in a timely fashion.(LF 23-43, 49-51) These motions were overruled in large part, and discovery went forward.

After extensive discovery, Respondent, Mid-America Transplant Services, filed its Motion for Summary Judgment on February 8, 2002.(LF 65-145) As part of its Summary Judgment Motion, Respondent, Mid-America Transplant Services, included the argument it was immune from liability pursuant to the Uniform Anatomical Gift Act, as enacted by the Missouri Legislature, in '' 194.210-194.290, RS Mo.(LF 68-69) Appellants filed their timely response to this Motion.(LF 159-172)

Jefferson County Circuit Court Judge Gary P. Kramer granted the Summary Judgment Motion of Respondent, Mid-America Transplant Services, on May 17, 2002.(LF 186-187) Pursuant to a Motion to Rehear/Reconsider filed by Appellants (LF 284-286), and after reargument, Judge Kramer entered a new order granting Summary Judgment as requested by Respondent, Mid-America Transplant Services, on the same basis as previously entered, and adopted, in its entirety, the written Summary Judgment Order previously entered on May 17, 2002.(LF 287) Judge Kramer added the additional paragraph to this order that, pursuant to Rule 74.01 (b.), Supreme Court Rules, 2002 edition, the Summary Judgment granted was found to dispose of all issues raised by the pleadings and was declared final for purposes of appeal.(LF 287)

Respondents, Jefferson Memorial Hospital and Christopher Guelbert, joined in a Motion for Summary Judgment.(LF 188-283) Appellants filed a timely response to that Motion.(LF 288-329) On July 5, 2002, Judge Gary P. Kramer granted the Summary Judgment as requested by Respondents, Jefferson Memorial Hospital and Christopher Guelbert.(LF 337) In that order, Judge Kramer stated he granted the Summary Judgment requested on the same basis as he had granted the Summary Judgment in favor of Respondent, Mid-America Transplant Services, in his order dated May 17, 2002.(LF 337)

POINTS RELIED ON

1. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, MID-AMERICA TRANSPLANT SERVICES, ON JUNE 14, 2002, ON THE BASIS OF APPLICATION OF §194.270, RSMO, AND THE IMMUNITY PROVISIONS CONTAINED THEREIN BECAUSE THIS STATUTE PROVIDES THAT IMMUNITY IS ONLY APPLICABLE WHEN THERE IS GOOD FAITH AND LACK OF NEGLIGENCE AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THIS RESPONDENT.

Spradlin vs. City of Fulton, 982 SW 2d 255,261 (Mo. banc 1998);

Moran vs. Kessler, 41 SW 3d 530,534 (Mo. App. 2001);

§194.270.3, RS Mo.

United Air Lines, Inc. vs. State Tax Commission, 377 SW 2d 444,448 (Mo. banc 1964)

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, ON JULY 5, 2002, ON THE BASIS OF IMMUNITY PROVISIONS CONTAINED IN § 194.270, RSMO, BECAUSE THIS STATUTE PROVIDES THAT IMMUNITY APPLIES ONLY WHEN A PARTY ACTS WITHOUT NEGLIGENCE AND IN GOOD FAITH AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THESE RESPONDENTS.

ITT Commercial Finance Corp. vs. Mid-America Marine Supply Corp., 854 SW2d 371,376, 377 (Mo. banc 1993)

King vs. Morgan, 873 SW 2d 272,275 (Mo. App. 1994)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, MID-AMERICA TRANSPLANT SERVICES, ON JUNE 14, 2002, ON THE BASIS OF APPLICATION OF §194.270, RSMO, AND THE IMMUNITY PROVISIONS CONTAINED THEREIN BECAUSE THIS STATUTE PROVIDES THAT IMMUNITY IS ONLY APPLICABLE WHEN THERE IS GOOD FAITH AND LACK OF NEGLIGENCE AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THIS RESPONDENT.

When a claim is decided on summary judgment, the applicable standard of review is essentially de novo. Century Fire Sprinklers, Inc. vs. CNA/Transportation Insurance Co., 23 SW 3d 874, 876-7 (Mo. App. 2000) The criteria on appeal for testing the correctness of a summary judgment are no different from those which should have been employed by the trial court to determine the correctness of sustaining the motion initially. ITT Commercial Finance Corp. vs. Mid-America Marine Supply Corp., 854 SW2d 371,376 (Mo. banc 1993) Because the trial court's judgment is founded on the records submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. ITT Commercial Finance Corp., at 377.

Summary judgment should be upheld on appeal if: (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law. ITT Commercial Finance Corp., at 377. When deciding appeals from summary judgments, the appellate court should review the record in the light most favorable to the party

against whom judgment was entered. The non-moving party should be accorded the benefit of all reasonable inferences. ITT Commercial Finance Corp., at 376.

Summary Judgments are "extreme and drastic remedies" and "great care" must be used when considering them. ITT Commercial Finance Corp., at 377; Lewis vs. Eisin 2002 WL 337775 (Mo. App. 2002) A genuine issue or dispute concerning material fact is one that is real, not merely argumentative, imaginary or frivolous. ITT Commercial Finance Corp., at 382. Skepticism towards the use of summary judgments has always existed due to the concern that because one party will be denied his or her day in court, this "boarders on denial of due process." ITT Commercial Finance Corp., at 377.

In cases in which negligence is alleged, summary judgment is not as feasible as in other types of cases. Lewis, at 1; Hammonds vs. Jewish Hospital of St. Louis, 899 SW 2d 527,529 (Mo. App. 1995;) Miller vs. River Hills Development, 831 SW 2d 756,763 (Mo. App. 1992)

The Summary Judgment Motion of Respondent, Mid-America Transplant Services, was directed primarily toward the issue of good faith immunity. This statement of good faith immunity is part of the Uniform Anatomical Gift Act, as it has been enacted in several other states. In Missouri, the statute at issue is §194.270.3, RS Mo. This section is contained within Chapter 194, entitled: "DEATH-DISPOSITION OF DEAD BODIES UNIFORM ANATOMICAL GIFT ACT". The applicable portion reads as follows:

> "A person who acts **without negligence and in good faith** in accord with the terms of this act or with the anatomical gift laws of another state or a foreign country is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act." (Emphasis added) §194.270.3, RS Mo

This portion of the statute, as it has been enacted in the State of Missouri by the legislature, is different than the act as it appears in many other states, by virtue of the addition of the requirement that, in order to take advantage of the stated immunity, a person needs to act in good faith but without negligence. This additional requirement of acting without negligence increases the burden of proof necessary for any potential defendant to claim and be granted the immunity provided under the statute.

Respondent, Mid-America Transplant Services, filed a Memorandum in Support of its Motion for Summary Judgment. The argument portion of that memorandum contains references to numerous cases from other jurisdictions. There does not appear to be any recorded Missouri appellate court cases interpreting the provisions of the Missouri statute on anatomical gifts at issue in this case.

The first case cited in support of its Motion for Summary Judgment by Respondent, Mid-American Transplant Services, is Andrews vs. Alabama Eye Bank, 727 So. 2d 62 (Al.1999) (LF 151) As part of the court's decision in that case, the Alabama Code section at issue was quoted verbatim as follows:

> "A person who acts in good faith in accord with the terms of this article or with the anatomical gift laws of another state or a foreign country is not liable for damages in any civil action or subject prosecution in any criminal proceeding for his act.@ Andrews." at 64.

Absent from this particular code provision at issue in Andrews, is any requirement of acting "without negligence", as appears in the Missouri statute. Therefore, any reliance on this case, or any other case that interprets a statute which fails to include a requirement of acting "without negligence" for the good faith immunity to attach, is misplaced and inapplicable to the present case.

The Summary Judgment Motion of Respondent, Mid-America Transplant Services, also cited the case of Brown vs. Delaware Valley Transplant Program, 615 A. 2d 1379 (PA Super. Ct. 1992), which again discussed the requirement of good faith in order to take advantage of immunity provided by the Pennsylvania version of the Uniform Anatomical Gift Act. The court pointed out that §8607© of the Pennsylvania statute provides civil and criminal immunity for: "...any person who acts in good faith in accord with the terms of this chapter...", Brown, at 1381. That case involved removal of the kidneys and heart of an unidentified person who died as a result of a gunshot wound to the head. The organs were removed before the identity of the deceased was determined and before any members of the family were contacted for consent. Later, the family filed suit against several persons involved in the transplant process. It was determined by the court that because the hospital, surgeon, local transplant program, and everyone else associated with the removal of the organs, acted in good faith in attempting to locate members of the family to obtain consent, there was no civil liability. When no

family members could be located, an emergency petition was filed in the local court seeking the court to grant permission and order the removal for transplantation of the decedent's organs, due to the emergency nature of the situation and the inability of the state police to locate relatives. Brown, at 93-96. In addition to being factually dissimilar, it interprets the good-faith provision of a statute which does not include the requirement that there be a showing of freedom from negligence, along with a showing of acting in good faith, in order to be granted the benefits of the immunity provisions contained in the statute.

After pointing out in its Motion and Memorandum in Support, that the New York version of the Uniform Anatomical Gift Act is "substantially" similar to Missouri's, Respondent, Mid-America Transplant Services, cited the case of Nicoletta vs. Rochester Eye and Human Parts Bank, Inc., 519 New York Supp. 2d 928 (Sup. Ct. N.Y. 1987). That case involved a dispute over written permission for removal of the eyes of a young man who died as a result of a motorcycle accident. After written permission was given and the eyes were removed, it was discovered the woman who signed the written permission was not, in fact, his natural mother. Suit was brought by the natural father of the deceased. In reaching its decision, the court cited §4306 (3) of the Public Health Law of the State of New York, quoting it as follows: "A person who acts in good faith in accord with the terms of this article...;" Nicoletta, at 929. Although this provision is identified by Respondent, Mid-America Transplant Services as "substantially similar",

the actual statutory language in the State of New York is substantially different in the one particular at issue here, namely, it does not require actions to be done without negligence and in good faith.

The statutes of the State of Michigan are also referred to as substantially similar to Missouri's statute. The case cited in support of that statement is Kelly-Nevils vs. Detroit Receiving Hospital, 526 NW 2d 15 (Mich. Ct. App. 1994). Like Brown, this case involved an unidentified person admitted to a hospital suffering from a gunshot wound to the head. Early the morning after admission, a person appeared at the hospital inquiring about the unidentified shooting victim. He identified himself as the victim's brother and only living relative. No one at the hospital asked him to furnish proof of his identity. He signed documents authorizing the harvesting of the victim's liver, kidneys, corneas, and bones. Later, it was discovered the victim had no brother and was survived only by his mother, who brought suit alleging negligence. As a defense, the hospital raised §14.15(10108) (3) MSA, referred to as substantially similar to Missouri's statute by Respondent, Mid-America Transplant Services, in its Motion for Summary Judgment. (LF 150) The court in its decision quoted the applicable provisions of this statute. It only requires actions to be done in good faith, with no requirement, as in Missouri, that actions also be free from negligence. Kelly-Nevils, at 18.

Courts must give effect to statutory language as written. Spradlin vs. City of Fulton, 982 SW 2d 255,261 (Mo. banc 1998); State Board of Registration for the Healing

Arts vs. Boston, 72 SW 3d 260, 265 (Mo. App. 2002) Traditional rules of statutory construction require that every word of a legislative enactment must be given meaning. Spradlin, at 262.

The legislative enactment passed by the Missouri Legislature added additional language, and, therefore, additional requirements, for persons in Missouri to claim and be granted immunity from civil lawsuits based on activities involved with organ procurement or donation. In order for the statutory language as written to be given effect, persons desiring good-faith immunity must also have acted "without negligence". §194.270.3, RSMo. This requirement is not present in the wording of the Uniform Anatomical Gift Act. This requirement is not present in the Alabama statute, nor the New York statute, nor the Michigan statute.

The wording in this portion of the Missouri statute cannot be ignored. The cases from these other jurisdictions relied upon by Respondent, Mid-America Transplant Services, and presented to the trial court in support of its Motion for Summary Judgment, are inapplicable because of this significant difference between the wording of the Missouri statute, when compared to the same provision as enacted in other jurisdictions. They do not, and should not, form the basis for the grant of Summary Judgment in this case

Because the Missouri Legislature chose not to adopt the Uniform Anatomical Gift Act verbatim, but, instead, to add the additional requirement that the person claiming the

immunity act without negligence, the courts of this state must give effect to the additional words, and must take the words and phrases contained within this statute in their plain or ordinary and usual sense. §1.090, RS Mo. Appellate courts must be guided by what the Legislature said, and not by what the courts think the Legislature meant to say. United Air Lines, Inc. vs. State Tax Commission, 377 SW 2d 444,448 (Mo. banc 1964) When interpreting a statute, the legislature is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. Moran vs. Kessler, 41 SW 3d 530,534 (Mo. App. 2001); State vs. Haskins, 950 SW 2d 613,615 (Mo. App. 1997)

It is axiomatic that in construing a statute the court's primary duty is to give effect to legislative intent as expressed in the words of the statute. Wilson vs. MacNeal, 575 SW 2d 802,809 (Mo. App. 1978) The words of the statute at issue here require a person to have acted "... without negligence and in good faith..." in order to be eligible to assert as a defense the good-faith immunity provided under the statute. Those are the words of the statute. The legislative intent is clear and unambiguous that a person must have acted without negligence and in good faith in order to obtain immunity. Neither the trial court nor this Honorable Court should attempt to change the clear intent of the words used, as evidenced by their plain and ordinary meaning.

Appellants maintain here, and argued before the trial court, this statutory provision only grants immunity to a person who acts without negligence and in good faith in accord

with the terms of the act. The trial court, in its Summary Judgment orders, determined the immunity referred to in this statute was available if a person acted only in good faith. Under the trial court's interpretation, there can be no inquiry into whether there existed any genuine dispute as to material fact on the issue of negligence in the case.

Appellants point out to this Court that the issue of good faith immunity was raised by means of a Motion to Dismiss filed by Respondents, Jefferson Memorial Hospital and Christopher Guelbert, in response to Appellants' petition. (LF 23-25, 40-43) The trial court denied the motions to dismiss and stated: "The motion to dismiss Plaintiffs' Petition for Good Faith Immunity is overruled, as the good faith immunity attaches only where there is no negligence involved, and Plaintiff has alleged negligence which, if believed, would defeat the immunity claim." (LF 52)

Whether Respondent, Mid-America Transplant Services, acted in a manner free from negligence should be a jury question. The jury should be entitled to hear the evidence and determine the presence or absence of negligence based on the pertinent facts, many of which have not been disputed during discovery.

The consent form signed by Appellant, Thelma Schembre, indicated she refused her consent for donation of "any needed tissue". (LF 77) The leader of the team dispatched to Respondent, Jefferson Memorial Hospital, to cut out and remove the various body parts from Frank Schembre, Sr., testified by deposition that 60-70 square inches of tissue, known as fascia lata, was removed from each side of the body of Frank

Schembre, Sr.(LF) The jury should be allowed to determine whether the actions of an employee of Respondent, Mid-America Transplant Services, in removing this tissue, despite the written statement on the consent form that consent was withheld for the removal of "any needed tissue", constitutes negligence. A determination of the existence of negligence is peculiarly within the province of a jury. The existence of this question of material fact alone should have prevented the issuance of summary judgment in favor of Respondent, Mid-America Transplant Services. Failing to note this limitation, and alter the usual process of tissue removal, should also be able to be considered by a jury on the issue of good faith.

In its Motion for Summary Judgment, much of the argument was devoted to emphasizing the fact that Appellant, Thelma Schembre, had signed the consent form without any specific limitation of removing only 2-4 inches of bone from the leg of her deceased husband. A jury should be entitled to consider the binding effect of this written consent form signed by Appellant, Thelma Schembre, within one hour of the death of her husband. A jury should be entitled to consider the emotional impact of the death of a long-time spouse in determining whether Appellant, Thelma Schembre, should be bound by statements on the written consent form which she testified did not accurately reflect her understanding and agreement concerning removal of bone and tissue from the body of her husband, Frank Schembre, Sr.(LF) If the jury decides Appellant and her children are bound by the express terms of the written consent form and the fact it

contained no limitation about the amount of bone to be removed, it should, nevertheless, be entitled to consider whether the removal of the tissue consisting of the fascia lata, from the body of Frank Schembre, Sr., exceeded the scope of permission given by Appellant, Thelma Schembre. Additionally, the jury should be entitled to consider whether any actions which exceeded the scope of the written consent form were done negligently or recklessly.

Even if the interpretation of §194.270, RS Mo, is limited to the presence or absence of "good faith", there is still a disputed issue of material fact, and a substantial jury question still exists. "Good faith" is a term which appears in areas of the law other than organ donation and procurement. In these other areas of the law, it has been held in Missouri the question of "good faith" is to be decided by a jury. In the context of the Uniform Commercial Code, the furnishing of false or fraudulent information may or may not support a good-faith entitlement to accelerate a debt, and is normally a jury question. Rigby Corp. vs. Boatmen's Bank and Trust Co., 713 SW2d 517,526-7 (Mo. App. 1986) Under the "vexatious refusal to pay" statute, the question of whether an insurer acted in good faith in denying a claim can be presented to the jury. Citizens Discount and Investment Corp. vs. Dixon, 499 SW 2d 231, 234 (Mo. App. 1973) An interpretation of the phrase "good faith" for purposes of evaluating the statements and conduct of a defendant in a slander or libel case has been held to be a question for the jury to decide. Hellesen vs. Knaus Truck Lines, Inc., 370 SW 2d 341,345 (Mo. 1963) On the issue of

whether a good faith defense was available in a Truth in Lending Act and tortious interference with a credit expectancy case, it was held the issue of "good faith" was a question for the jury. Bell vs. May Department Stores Co., 6 SW 3d 871, 875-6 (Mo. banc 1999) If the meaning and elements of good faith can be held to be for the jury in these types of cases, good faith can also be a jury question in any necessary interpretation of Missouri's Uniform Anatomical Gift Act.

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE REQUESTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, JEFFERSON MEMORIAL HOSPITAL AND CHRISTOPHER GUELBERT, ON JULY 5, 2002, ON THE BASIS OF IMMUNITY PROVISIONS CONTAINED IN § 194.270, RSMO, BECAUSE THIS STATUTE PROVIDES THAT IMMUNITY APPLIES ONLY WHEN A PARTY ACTS WITHOUT NEGLIGENCE AND IN GOOD FAITH AND GENUINE ISSUES OF MATERIAL FACT EXIST ON THE ISSUE OF THE NEGLIGENCE OF THESE RESPONDENTS..

All of the arguments set forth under Point I apply equally to this Point. Appellants will not restate them and unduly lengthen this brief. However, because the actions which form the basis of the alleged negligence on the part of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, differ from the actions which formed the basis of the alleged negligence of Respondent, Mid-America Transplant Services, some additional discussion is necessary.

A genuine issue of material fact exists concerning whether Respondent, Christopher Guelbert, an employee and agent of Respondent, Jefferson Memorial Hospital, was negligent in his explanation and representations concerning the amount of bone to be removed from the body of Frank Schembre, Sr., on the evening of November 28, 1998. After review of the depositions of Respondent, Christopher Guelbert, and Appellants, Thelma Schembre, Laurie Laiben, and Bobby Joe Schembre, it is apparent there is a dispute of material fact concerning those representations and the discussion which occurred.(LF) Because of the presence of such genuine disputed issues, summary judgment should not have been granted. ITT Commercial Finance Corp., at 377. Additional genuine issues of disputed material fact exist as to whether another agent or employee of Respondent, Jefferson Memorial Hospital, also spoke with Appellants, Thelma Schembre, Laurie Laiben, and Bobby Joe Schembre, on the evening of November 28,1998, and made additional incorrect statements and representations concerning the usual procedure and amounts of bone removed from the body of a deceased person. (LF)

§194.233.1, RS Mo, requires the Chief Executive Officer of Respondent, Jefferson Memorial Hospital, to designate trained persons to request anatomical gifts, which persons designated should not be connected with the determination of death. Additionally, there was testimony that Federal guidelines prior to November, 1998, required the appointment of a designated requestor to approach families about the issue

of organ or tissue donation. (LF 456-457) A genuine issue of material fact exists as to whether Respondent, Christopher Guelbert, was that designated trained person. (LF 457-459) Also, because he was part of the resuscitation effort in the Emergency Room, a genuine issue of material fact exists as to whether he was someone connected with the determination of death. (LF)

Failure to comply with the requirements of a statute can be considered negligence per se in some situations. Violation of a statute constitutes actionable negligence per se if the following four elements are met:

> "(1) There was, in fact, a violation of the statute; (2) The injured plaintiff was a member of the class of persons intended to be protected by the statute; (3) The injury complained of was of the kind the statute was designed to prevent; and (4) the violation of the statute was the proximate cause of the injury." King vs. Morgan, 873 SW 2d 272,275 (Mo. App. 1994)

There is a very real question revealed by the discovery as to whether Respondent, Jefferson Memorial Hospital, did violate the state and/or federal statute. Appellants submit that Appellant, Thelma Schembre, as the spouse of the deceased, and her children, are in the class of persons intended to be protected. The injury complained of in this case, namely mutilation of a body and failure to comply with the wishes of the family of the deceased, is of the kind these statutes were designed to prevent by making certain the persons approaching the family of the deceased were properly trained and able to convey all necessary details about tissue donation to the family. Appellants submit this violation was the proximate cause of the injury about which Appellants complain. These disputed issues of fact on the issue of negligence per se should prevent the entry of summary judgment against Appellants.

The previously stated genuine disputes of material fact on the jury issue of negligence should have also prevented the entry of a summary judgment in favor of these Respondents. Applying the same arguments from Point I, summary judgment

should not have been entered because of genuine issues of material fact which remain concerning whether good faith should be decided by the jury.

CONCLUSION

The order granting summary judgment in favor of Respondent, Mid-America Transplant Services, was erroneous because it failed to consider the requirement contained within §194.270.3, RS Mo, of freedom from negligence in addition to good faith. The order granting summary judgment in favor of Respondents, Jefferson Memorial Hospital and Christopher Guelbert, was also erroneous for the same reason. Appellants respectfully request both summary judgment orders be set aside and the case be remanded to the trial court for further proceedings and trial to a jury.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

THELMA SCHEMBRE, et. al	)	
	)	
Appellants,	)	
	)	**APPEAL NO. ED81539**
vs.	)	
	)	
MID AMERICA TRANSPLANT	)	
SERVICES, et. al	)	
	)	
Respondents.	)	

CERTIFICATE

I hereby certify, in accordance with Supreme Court Rule 84.05(b) that the original and 9 copies of APPELLANTS' BRIEF with a floppy disk in the above-entitled cause was filed this 12th day of November, 2002 with the Clerk of the Court Of Appeals, Eastern District, Missouri, and 2 copies of the entire BRIEF with a floppy disk was mailed, postage pre-paid addressed to Edward S. Meyer, Attorney for Respondent, 8000 Market St., 23rd Fl., St. Louis, Missouri, 63101, Randall D. Sherman, Attorney for Respondent, 455 Maple Street, Hillsboro, Missouri, 63050 and Judith Brostron, Attorney for Respondent, 714 Locust, St. Louis, Missouri, 63101.

I hereby certify this brief contains all information required by Rule 55.03, Supreme Court Rules 2002 ed.; it complies with the limitations contained in Rule 84.06, Supreme Court Rules, 2002 ed.; it contains 7,110 words, in Word Perfect 8 format since Word is unavailable in this office; the disk provided has been scanned for viruses and is virus-free.

ROBERT J. LENZE, P.C.

By: _____
Robert J. Lenze, #31789
Attorney for Appellants
3703 Watson Road
St. Louis, Missouri 63109

Telephone: (314) 781-0391
Fax: (314) 781-0324

APPENDIX TABLE OF CONTENTS